

THERE'S A(N) (ANATOMICAL) BOY IN THE LITTLE GIRLS' ROOM: GENDER NONCONFORMING CHILDREN AND THEIR ACCESS TO THE BATHROOM

BLAKELEY SIMPSON*

ABSTRACT

For gender nonconforming persons, the issue of which sex-segregated bathroom to use can be a constant, daily struggle. This issue becomes even more nuanced when a young child with Gender Dysphoria (GD) seeks to gain access to the sex-segregated bathroom that matches his or her gender identity at school. Precisely because a young child is not physically mature enough to receive medical treatment for GD, such as hormone blockers or cross-hormone therapy, a child's ability to use the bathroom corresponding to his or her gender identity in school becomes an important and necessary means of gender expression. This Note argues that as long as GD is listed in the *Diagnostic and Statistical Manual of Mental Disorders*, a state disability claim is likely the most successful legal argument a child with GD may bring in order to gain access to the bathroom of his or her identified gender in school. However, a state disability claim has unique and significant drawbacks, such as the risk of further stigmatization and misunderstanding of gender identity. Further, the success of a child's state disability claim will hinge entirely on the particular disability laws of his or her forum state.

* Class of 2014, University of Southern California Gould School of Law; B.A. Art History and Medieval & Renaissance Studies 2011, Washington and Lee University.

TABLE OF CONTENTS

I. INTRODUCTION	92
II. UNDERSTANDING GENDER NONCONFORMITY.....	94
A. FRAMING THE ISSUES	94
B. GETTING THE DIAGNOSIS AND TREATMENT: GENDER DYSPHORIA IN CHILDREN.....	99
C. ISOLATION, DEPRESSION, AND REJECTION: HOW GENDER NONCONFORMITY AFFECTS CHILDREN INSIDE AND OUTSIDE OF SCHOOL.....	102
D. LACK OF SCHOLARSHIP ADDRESSING GENDER NONCONFORMING CHILDREN AND THEIR ACCESS TO THE BATHROOM	103
III. LAWS OF THE BATHROOM.....	106
IV. GAINING ACCESS	108
A. THE CURRENT LEGAL LANDSCAPE OF SEX-SEGREGATED BATHROOMS IN SCHOOLS	108
1. Fourteenth Amendment Equal Protection Clause Claim ..	109
2. First Amendment Freedom of Speech Claim.....	111
3. Federal Discrimination and Disability Law Claims.....	112
B. GETTING A FOOT IN THE DOOR: A STATE DISABILITY CLAIM	113
V. CONCLUSION	119

I. INTRODUCTION

“Unless you have actually experienced [it], you cannot conceive of the trauma of being cast in the wrong body. It is the imprisonment of body and of soul.”¹

- Mario Martino

Going to the bathroom is a part of daily life. Most people enter a restroom without second thought. Women look for the female stick figure, men for the male one, and enter without hesitation. For some, however, this daily activity can cause fear and anxiety. With only two options to choose from, which door do people walk through if they do not identify with the stick figure that matches their sex assigned at birth? Even more troubling, what if a young child is told that she cannot go to the bathroom

¹ MARIO MARTINO, *EMERGENCE: A TRANSSEXUAL AUTOBIOGRAPHY* xii (1977).

with the other girls at school because she is not *really* like them because she happened to be born a boy? How should grammar schools treat gender nonconforming children,² “still in the single-digit haze[,] that [people] like to assume [are] sexless and even genderless, with no rebellions or acne or sapling mustaches to spoil the illusion”?³ When there are only two options, boys or girls, which bathroom are gender nonconforming children supposed to use?

Because young children have limited means of expressing their gender identity until they are old enough to receive medical treatment to bring their physical appearance in line with their gender identity,⁴ the ability to use the bathroom that matches their gender identity is invaluable. This Note argues that a state disability claim offers the best legal avenue for gender nonconforming children with Gender Dysphoria (GD) to gain access to the sex-segregated bathroom that matches their gender identity in school. This Note focuses specifically on prepubescent school-age children whose expression of gender identity is limited to their outward appearance and behavior because they are not physically mature enough to receive medical treatment for their gender nonconformity. This Note does not address issues that may arise in pubescent or adolescent children who are eligible for hormone therapy, or concerns regarding gender-segregated locker rooms and sports teams. Rather, this Note focuses only on prepubescent school-age children and their ability to use the sex-segregated bathroom that matches their gender identity.

Part II of this Note introduces the struggles of gender nonconforming children by way of recent publicized stories. It also examines the diagnostic criteria and treatment of GD in children, explores how gender

² The term “gender nonconforming” is used to describe a person whose gender identity does not match their assigned sex at birth. Throughout this Note, the male and female pronouns used to reference a gender-nonconforming child are those pronouns associated with their gender identity rather than their biologically assigned sex at birth. For example, in discussing a male child with Gender Dysphoria identifying as a female, this Note uses the pronouns “she” and “her.” This Note uses the gender pronouns and first name of the child at birth when discussing events prior to the child’s transition, and the pronouns and first name of his or her identified gender when discussing events after transitioning.

³ Jesse Green, *S/He: Parents of Transgender Children Are Faced With a Difficult Decision, And It’s One They Have to Make Sooner Than They Ever Imagined*, N.Y. MAGAZINE, June 4, 2012, at 24, 81.

⁴ This Note acknowledges that gender nonconforming children can outwardly dress as the gender that matches their gender identity, but argues that because outward appearance and behavior are the only means through which children can express their gender identity until they are old enough for medical treatment, access to the bathroom that matches their gender identity is imperative.

nonconformity can create feelings of isolation and depression in children who are not allowed to express their gender identity, and discusses the existing literature dealing with gender nonconforming children and their access to the bathroom that matches their gender identity. Part III looks at the “norm” of sex-segregated bathrooms and explores how gender and sex in society are viewed as strict binaries. Part III also provides a brief discussion of the adoption of gender-neutral bathrooms in higher education and corporate policies.

Part IV shifts to the primary argument of the Note. Part IV.A explores the current legal landscape of sex-segregated bathrooms in schools, including various state and federal laws that exempt sex-segregated bathrooms from sex-discrimination laws. Part IV.A also discusses various legal claims, such as sex discrimination, equal protection, and First Amendment arguments that would fail to gain a gender nonconforming child access to the bathroom that matches his or her gender identity. Part IV.B examines the different legal frameworks that states employ to protect against disability discrimination and argues that a state disability claim which frames bathroom use as a necessary disability treatment is the best option for a gender nonconforming child to successfully litigate his or her claim. Part IV.B also looks at potential defenses to such a claim, as well as general criticisms, such as the possibility of GD being further stigmatized or misunderstood. Last, Part V provides concluding thoughts on the topic.

II. UNDERSTANDING GENDER NONCONFORMITY

Part II is divided into four subparts. Part II.A uses the stories of three gender nonconforming children to frame the issues surrounding the general misunderstanding of gender nonconformity. Part II.B details the diagnostic framework employed by the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-V)* for GD in children. Part II.C moves beyond the *DSM-V* and explores how GD can create feelings of isolation and depression in children who are not allowed to express their gender identity. Last, Part II.D highlights the lack of scholarship addressing gender nonconforming prepubescent children and their access to the bathroom that matches their gender identity.

A. FRAMING THE ISSUES

Like many girls, Nicole Maines wanted a Barbie birthday cake for

her fourth birthday and to be a princess for Halloween.⁵ That same year, Nicole asked her mother, “When do I get to be a girl?[,]” because unlike many girls, Nicole was born an identical twin boy.⁶ Nicole, born Wyatt, always knew that she was a girl.⁷ In kindergarten, she asked her father when she could get rid of her penis that she hated so much,⁸ and by the fourth grade, she had long hair and began going by “Nicole,” or “Nikki” for short.⁹ While in the fifth grade, Nicole’s parents legally changed her name, and she began wearing girl’s clothes to school and using the girls’ bathroom.¹⁰ She was popular and well liked, did very well in school, and was elected vice president of her fifth grade class.¹¹

Unfortunately, not everyone was accepting of Nicole’s transformation, and things changed when one of her classmates “called her a ‘faggot[.]’ [and] objected to her using the girls’ bathroom.”¹² Reacting to a complaint from the classmate’s legal guardian, the school refused to allow Nicole to use the girls’ bathroom and instead forced her to use a staff bathroom.¹³ The school also “assigned an adult to watch her at all times between classes, following her to the cafeteria [and] to the bathroom.”¹⁴ Nicole found this “eyes-on” policy stressful and intrusive; she explained:

An adult would stand 15 feet away from me wherever I went. When I would go to the bathroom, they would follow me. When I would go to the lunchroom, they [would] follow me. It was like I had an invisible string attached to me and they were on the other end. It was ridiculous.¹⁵

Although the “eyes-on” policy was intended to protect Nicole from bullying and harassment, it only exacerbated Nicole’s isolation from her

⁵ Bella English, *Led by the Child Who Simply Knew*, BOSTON GLOBE, Dec. 11, 2011, http://www.boston.com/lifestyle/family/articles/2011/12/11/led_by_the_child_who_simply_knew/.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Judy Harrison, *Judge Hears Arguments in Lawsuit over Orono School’s Treatment of Transgender Child*, BANGOR DAILY NEWS, Sept. 19, 2012, <http://bangordailynews.com/2012/09/19/news/bangor/judge-hears-arguments-in-lawsuit-over-orono-schools-treatment-of-transgender-child/> [hereinafter Harrison, *Judge Hears Arguments*].

peers.¹⁶

In response to the school's refusal to allow Nicole to use the girls' bathroom and its inadequate response to peer harassment, her parents filed a complaint with the Maine Human Rights Commission (MHRC).¹⁷ The MHRC found that the school's actions constituted discrimination, and in November 2009, the MHRC and Nicole's parents filed a lawsuit against the school district for violating the Maine Human Rights Act (MHRA), which was amended in 2005 to prohibit discrimination on the basis of sexual orientation in educational institutions and public accommodations.¹⁸

In November 2012, the court found that the school did not violate the MHRA because its decision to prohibit Nicole from using the girls' bathroom was explicitly permitted by an MHRA regulation,¹⁹ which provides that "[a]n educational institution may provide separate toilet . . . facilities on the basis of sex."²⁰ Emphasizing "that 'sex' means biological sex," the court also concluded that Nicole was not entitled to use the girls' restroom under the MHRA regulation because she is not a member of the female sex.²¹ While refusing to apply Title VII's burden-shifting framework of *McDonnell Douglas Corp. v. Green*,²² the court noted, *arguendo*, that absent proof that Nicole was qualified or entitled to use the public accommodation in question, her parents and the MHRC cannot establish a prima facie case against the school as required under *McDonnell*.²³ Further, applying the Title IX standard for discrimination in education as opposed to the Title VII standard for discrimination in the workplace, the court found that the school's response to Nicole's harassment, including the "eyes-on" policy, was not "clearly unreasonable," and rejected the claim that the school aided and abetted

¹⁶ *Id.*; English, *supra* note 5.

¹⁷ Harrison, *Judge Hears Arguments*, *supra* note 15; Judy Harrison, *Judge Finds in Favor of Orono Schools over Transgender Girl's Use of Bathroom*, BANGOR DAILY NEWS, Nov. 20, 2012, <http://bangordailynews.com/2012/11/20/news/bangor/judge-finds-in-favor-of-orono-schools-over-transgender-girls-use-of-bathroom/> [hereinafter Harrison, *Judge Finds in Favor of Orono*].

¹⁸ Harrison, *Judge Hears Arguments*, *supra* note 15; Harrison, *Judge Finds in Favor of Orono*, *supra* note 17; see also ME. REV. STAT. ANN. tit. 5, §§ 4601–4602, 4591–4592 (2005).

¹⁹ Decision & Order on Defendants' Motion for Summary Judgment at 13, *Doe v. Clenchy*, No. PENcv-09-201 (Me. Super. Ct. Nov. 20, 2012) [hereinafter *Doe v. Clenchy Order*].

²⁰ 94-348-4 ME. CODE R. § 4.13 (LexisNexis 1984).

²¹ *Doe v. Clenchy Order*, *supra* note 19, at 16.

²² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²³ *Doe v. Clenchy Order*, *supra* note 19, at 17–18.

discrimination by acting with deliberate indifference to peer harassment.²⁴ Nicole's family appealed the decision and is currently waiting for a decision from Maine's highest court.²⁵

Sadly, other students throughout the country are facing problems similar to those faced by Nicole. For example, in Georgia, a gender nonconforming boy's father and grandmother petitioned the school board to allow him to use the boys' bathroom.²⁶ The father claimed that by refusing his child, nicknamed D, access to the boys' restroom, the school "jeopardized the safety not only of his child but [also that of the] other students."²⁷ The school's refusal to accommodate D eventually led to his father pulling him out of the school.²⁸ According to D's father, forbidding his son from using the boys' bathroom endangered D; he said:

Forcing him to use a bathroom that does not match his presentation effectively discloses his status as a transgender child and thus endangers him. My child very much wants to go to school and interact with other children at a normal school setting. He deserves the same opportunities that any child in this country should have.²⁹

Ultimately, the school board decided that D was "welcome to return to school" on the condition that he use the girls' bathroom.³⁰ The superintendent based his decision on the fact that "[a]ll the information [he had] show[ed] that the child is a little girl," as well as the fact that he was receiving calls from the parents of other students who opposed D's use of the boys' bathroom.³¹

²⁴ *Id.* at 18–24. "The Title IX standard requires a showing of deliberate indifference to known harassment. In contrast, the Title VII standard only requires a showing that the harassment is known and that there has been a failure to take appropriate remedial action." *Id.* at 19–20 (internal citations omitted).

²⁵ GLAD Argues Transgender Girl's Case Before Maine High Court, GAY & LESBIAN ADVOCATES & DEFENDERS (June 12, 2013), <http://www.glad.org/current/press-release/glad-argues-transgender-girls-case-before-maine-high-court>.

²⁶ Teresa Stepzinski, *McIntosh County School Officials in Quandary Over Letting Transgender Student to Use Boys' Restroom*, FLORIDA TIMES-UNION (Sept. 16, 2011, 10:32 AM), <http://jacksonville.com/news/georgia/2011-09-15/story/mcintosh-county-school-officials-quandary-over-letting-transgender>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Teresa Stepzinski, *Transgender Student Issue Perplexes McIntosh County, Ga., Parents, School Officials*, FLORIDA TIMES-UNION (Sept. 17, 2011, 9:04 AM), <http://jacksonville.com/news/georgia/2011-09-17/story/transgender-student-issue-perplexes-mcintosh-county-ga-parents-school>.

³¹ *Id.*

The problems faced by students like Nicole and D are not limited to public schools. When Isaac began seventh grade as a boy at the private school in Manhattan, where he had attended as a girl since the age of two, his teachers and the school administration reacted negatively.³² His teachers forced him to “sit in front of his seventh grade class and explain himself to his peers, without any adult backup,” which made him feel “like he could not refuse to answer their intimate questions.”³³ One student asked him, “How do you hide your boobs?” and Isaac replied that he uses an elastic bandage to bind his chest.³⁴ Despite all the explanations, Isaac “lost all his friends,” was denied permission to give a presentation to the school on November 20, the Transgender Day of Remembrance, and his teachers continued to group him with the girls during classroom activities.³⁵

The stories of students like Nicole, D, and Isaac present the complex issues that arise when a child does not conform to society’s traditional understanding of gender, gender identity, and sex.³⁶ For most people, their gender identity conforms to their biological sex. For example, a male child with male genitalia who exhibits traditionally masculine behavior is gender conforming—meaning that his gender identity matches the gender behaviors stereotypically associated with his biological sex. On the other hand, a male child with male genitalia who identifies more with stereotypically female gender behaviors is considered gender nonconforming.

In much of society’s treatment of gender nonconformity, there is an overarching theme of misunderstanding what nonconforming gender identity entails. Many people equate gender nonconformity with same-sex attraction. One journalist characterized the problem as follows:

[Gender nonconformity] is exponentially more confusing to even the most-gay positive parents. Everyone has felt what it is to be sexually attracted to someone, so it [is] not generally difficult to imagine what a gay child is talking about. But it takes a powerful act of imagination to understand what a [gender nonconforming] child, in his perfect little

³² Green, *supra* note 3, at 29, 80.

³³ *Id.* at 80.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Sex refers to a person’s biological status assigned at birth, while “gender identity refers to one’s sense of oneself as male, female, or transgender.” *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation*, AM. PSYCHOL. ASS’N, <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Oct. 18, 2013).

body on the changing table, might be feeling, or why he might become terrified as adolescence approaches.³⁷

As these stories illustrate, complicated problems arise when a gender nonconforming child has to live in a society where bathrooms are classified by sex.

B. GETTING THE DIAGNOSIS AND TREATMENT: GENDER DYSPHORIA IN CHILDREN³⁸

According to the *DSM-V*, GD “refers to the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender. Although not all individuals will experience distress as a result of such incongruence, many are distressed if the desired physical interventions by means of hormones and/or surgery are not available.”³⁹ For GD in children, the *DSM-V* requires “a marked incongruence between one’s experienced/expressed gender and assigned gender, of at least [six] months’ duration” and “clinically significant distress or impairment in social, school, or other important areas of functioning.”⁴⁰ The “marked incongruence” aspect requires that at least six of the following criteria be met, one of which must be the first:

1. A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one’s assigned gender).
2. In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical female clothing.
3. A strong preference for cross-gender roles in make-believe play or fantasy play.
4. A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender.

³⁷ Green, *supra* note 3, at 27.

³⁸ The *Diagnostic and Statistical Manual of Mental Disorders* provides “one overarching diagnosis of gender dysphoria, with separate developmentally appropriate criteria sets for children and for adolescents and adults.” AM. PSYCHIATRIC ASS’N: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (Am. Psychiatric Ass’n, 5th ed. 2013) [hereinafter *DSM-V*]. This Note omits reference to the separate criteria for adolescents and adults as its focus is on prepubescent children.

³⁹ *Id.*

⁴⁰ *Id.* at 452.

5. A strong preference for playmates of the other gender.
6. In boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games, and activities.
7. A strong dislike of one's sexual anatomy.
8. A strong desire for the primary and/or secondary sex characteristics that match one's experienced gender.⁴¹

In addition to the basic diagnostic criteria for GD, the *DSM-V* draws on well-documented behavioral gender differences between boys and girls and explains that doctors should distinguish "simple nonconformity to stereotypical gender role behavior" from pervasive and extensive wishes to conform to the activities of their identified gender when diagnosing GD.⁴²

The onset of gender nonconforming behaviors typically occurs between ages two and four years.⁴³ Not all children diagnosed with GD, however, will meet the diagnostic criteria for GD as adults.⁴⁴ According to the *DSM-V*, GD persists into adolescence or adulthood in 2.2 percent to 30 percent of males, and the majority of male children who have GD that does not persist into adulthood eventually self-identify as gay or homosexual.⁴⁵ Persistence in female children with GD ranges from 12 percent to 50 percent.⁴⁶ Additionally, some studies suggest that less than 25 percent of children with GD will grow into transgender adults.⁴⁷ Although the exact cause of GD remains unknown, many experts believe that it is biological and that hormones and genes are "the primary architects of gender identity."⁴⁸ However, with very few studies, most of which have not been replicated, the biological foundation of gender identity remains unclear.⁴⁹

Children with GD often have "elevated levels of emotional and

⁴¹ *Id.*

⁴² *Id.* at 453–59.

⁴³ *Id.* at 455.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Green, *supra* note 3, at 80.

⁴⁸ DEBORAH RUDACILLE, *THE RIDDLE OF GENDER: SCIENCE, ACTIVISM, AND TRANSGENDER RIGHTS* 139 (2005).

⁴⁹ *Id.*

behavioral problems—most commonly, anxiety, disruptive and impulse-control, and depressive disorders.”⁵⁰ Further, their preoccupation with the desire to be their identified gender often disrupts everyday activities.⁵¹ Boys diagnosed with GD often prefer to dress in female clothing and may use items such as scarves and towels to simulate long hair and skirts.⁵² At playtime, gender nonconforming boys may exhibit a strong preference for stereotypically feminine activities, such as playing with Barbies or playing the mother role while “playing house.”⁵³ Further, they may display an aversion to stereotypically masculine activities like playing with cars or participating in “rough-and-tumble play.”⁵⁴ Similarly, girls with GD often express extreme dislike for feminine clothing.⁵⁵ They typically prefer boys’ hairstyles and clothing, and show an interest in cross-gender activities, like contact sports, rough play, and traditional boy games.⁵⁶

The characteristic symptoms of GD make it clear that children with GD are not simply going through a phase.⁵⁷ GD in children is more than “simple nonconformity to stereotypical gender role behavior”: it is more than mere “tomboyism” in female children or “girly-boy” behavior in male children.⁵⁸ Due to “the increased openness of atypical gender expression by individuals across the entire range of transgender spectrum, [however,] it is important that the clinical diagnosis be limited to those [children] whose distress and impairment meet the specified criteria.”⁵⁹

Once children are diagnosed with GD, they begin a long journey toward correcting their physical appearances to conform to their gender identity. Even with a diagnosis, however, many parents remain fearful of medically treating their child’s GD; “[t]hough they would not hesitate to treat their child with serious drugs for a serious disease, they often see gender transition as frivolous or elective.”⁶⁰ The lack of reliable data and statistical information regarding how many children with GD will become

⁵⁰ DSM-V, *supra* note 38, at 458–59.

⁵¹ *Id.* at 457–58.

⁵² *Id.* at 453.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.* at 458.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Green, *supra* note 3, at 28.

transgender adults only contributes to the problem.⁶¹

Normally, children with GD can begin hormone therapy in the early stages of puberty.⁶² During this time, doctors can safely administer hormone blockers, which are “synthetic versions of naturally occurring hormones[,]”⁶³ to delay puberty and prevent the development of “secondary sexual characteristics,” like breasts and facial hair.⁶⁴ This stage of hormone therapy is fully reversible.⁶⁵ If a child stops receiving the blockers, he or she will go through puberty normally. Most doctors require that a child receive psychotherapy for one year before receiving hormone blockers.⁶⁶ As the next stage of treatment, children as early as sixteen may receive “cross-hormones[,]”⁶⁷ which “masculinize or feminize” the body to match their gender identity.⁶⁸ The last stage of treatment is irreversible gender reassignment surgery to give the “gender-appropriate genitalia, and breasts or chest.”⁶⁹ Most doctors will not perform gender reassignment surgery until a child turns eighteen, which is the minimum age for giving informed consent.⁷⁰

C. ISOLATION, DEPRESSION, AND REJECTION: HOW GENDER NONCONFORMITY AFFECTS CHILDREN INSIDE AND OUTSIDE OF SCHOOL

Children diagnosed with GD often feel socially isolated, which may lead to decreased attendance in school and even dropping out.⁷¹ In a 2011 study, four in ten lesbian, gay, bisexual, and transgender (LGBT) students reported feeling unsafe at school because of their gender identity, while two-thirds reported being verbally harassed because of their gender identity.⁷² Notably, the source of harassment was not restricted to students:

⁶¹ See *id.* at 80.

⁶² Sonja Shield, Article, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 391 (2007).

⁶³ Green, *supra* note 3, at 28.

⁶⁴ English, *supra* note 5.

⁶⁵ Shield, *supra* note 62, at 390–91.

⁶⁶ Green, *supra* note 3, at 81.

⁶⁷ *Id.* at 27.

⁶⁸ Shield, *supra* note 62.

⁶⁹ *Id.* at 392.

⁷⁰ Green, *supra* note 3, at 27.

⁷¹ DSM-V, *supra* note 38, at 457–58.

⁷² Kosciw, J.G. et al., *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, GAY, LESBIAN &

56.9 percent of the students surveyed reported hearing negative comments from their teachers and school staff about a gender nonconforming student.⁷³

Unfortunately, these feelings of isolation, lack of safety, and judgment are not limited to the classroom or schoolyard; they also spread to family relationships. For many families, gender nonconformity is a foreign concept.⁷⁴ Most parents of prepubescent gender nonconforming children, as opposed to parents of puberty-aged adolescents expressing typical sexual attractions, are unable to imagine what their gender nonconforming child might be feeling. Parents who accept their child's gender identity often have to put aside their own phobias and prejudices to do what is best for their child. Frequently, the risk of suicide strongly motivates parents to accept their child's nonconforming gender identity.⁷⁵ One father explained:

I want the normal life. And this was gonna be different, when my son is getting out of the car in a dress in front of everybody. But then you have to think about who are you protecting? Yourself or your kid? People would say, 'I can't believe you'd let your kid do that. That's abuse.' I'll tell you what's abuse: suicide. Do you want a live daughter or a dead son?⁷⁶

However, even the most accepting parents acknowledge that, while they might be able to provide a safe home environment, they cannot shield their child from society's discriminations and prejudices.⁷⁷

D. LACK OF SCHOLARSHIP ADDRESSING GENDER NONCONFORMING CHILDREN AND THEIR ACCESS TO THE BATHROOM

The existing literature addressing the unique issues faced by prepubescent children with GD and their access to the bathroom of their identified gender is arguably nonexistent. Many scholars have addressed the legal rights of gender nonconforming adults.⁷⁸ Fewer have addressed

STRAIGHT EDUC. NETWORK 19, 24, (2012), <http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>.

⁷³ *Id.* at 16.

⁷⁴ Green, *supra* note 3, at 27.

⁷⁵ *Id.* at 26.

⁷⁶ *Id.*

⁷⁷ *Id.* at 80.

⁷⁸ See generally S. Elizabeth Malloy, Article, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32

the issues faced by gender nonconforming young adults, though some scholars have addressed gender-neutral housing in university dormitories and adolescent access to medical treatment.⁷⁹ Although there is one article that examines the practical implications of applying state disability laws to transgender adults, it fails to address young children with GD.⁸⁰

A small number of scholars have addressed equal protection issues regarding gender-segregated bathrooms, arguing that gender segregation results in inherently unequal treatment for females and perpetuates negative sex stereotypes.⁸¹ For example, one scholar argues that the segregated men's bathroom in the business world has formed business and social networks and allowed men to unfairly maintain their success in the corporate world.⁸² The amount of literature addressing how sex-segregated bathrooms affect people with GD is limited,⁸³ and there is no article that

WOMEN'S RTS. L. REP. 283 (2011) ("examin[ing] the issues and controversies that . . . [have resulted from a] lack of protection under anti-discrimination laws, particularly the Americans with Disabilities Act (ADA) and Title VII"); Shawn D. Twing & Timothy C. Williams, Article, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class Under the Term 'Sex' and Practical Implications of Inclusion*, 15 TEX. J. C.L. & C.R. 173 (2010) (evaluating the current laws regarding transsexual rights and discussing the possible expansion of equal employment protections to transgender people).

⁷⁹ Katherine A. Womack, Comment, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1397 (2010) (arguing that the Department of Education should extend Title IX protections to "allow transgender students to live in single-sex [university] housing that conforms to their gender identity"); Shield, *supra* note 62, at 401–433 (concluding that many adolescents have the ability to make informed decisions with regard to medical treatment and that doctors and advocates should assist transgender adolescents in obtaining necessary medical treatment).

⁸⁰ Jeannie J. Chung, *Identity Or Condition?: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, 21 COLUM. J. GENDER & L. 1 (2011).

⁸¹ E.g., Kelly Levy, *Equal, But Still Separate?: The Constitutional Debate of Sex-Segregated Public Restrooms in the Twenty-First Century*, 32 WOMEN'S RTS. L. REP. 248, 256 (2011) ("One negative generalization of women that separate restrooms perpetuate is that women are physically weak and need to be protected from and by men."); Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 218–19 (Harvey Molotch & Laura Norén eds., 2010) (discussing the "potty parity" trend and how increasing unisex bathrooms may help decrease varying stereotypes, such as fathers not taking young children out for lack of access to child changing stations and not requiring people to self-regulate their gender for the world to see).

⁸² Levy, *supra* note 81, at 264–65 (explaining that although women are allowed in "old boys' clubs," restrooms are still often separate, so women do not get the benefit of continuing informal business conversations after the conclusion of a meeting).

⁸³ See generally Jennifer Levi & Daniel Redman, Article, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 148–49 (2010) (comparing cross-dressing laws to bathroom access laws and proposing a set of arguments for transgender equality based bathroom access); Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next*

directly addresses issues regarding prepubescent children with GD and their access to school bathrooms.

For most people, regardless of their gender identity, the bathroom is a sensitive area, and the protection of privacy has long been an important justification for maintaining sex-segregated bathrooms.⁸⁴ For example, in public bathrooms, strangers share space with limited privacy, and unexpected occurrences, like accidentally walking into a stall occupied by another person, often lead to shame or embarrassment.⁸⁵ Proponents of sex-segregated bathrooms contend that they are necessary to promote safety, particularly female safety, and “female modesty,” as well as to account for real biological differences between the sexes.⁸⁶ Proponents of unisex bathrooms, however, urge that getting rid of sex-segregated bathrooms would combat gender stereotypes and lessen the stigma against gender nonconforming individuals who do not identify as male or female.⁸⁷

For gender nonconforming adults, the primary concern about using the bathroom of their identified gender is safety. They often risk being subject to violence, harassment, or abuse by others when they use the bathroom of their identified gender.⁸⁸ Thus, using the bathroom can become a source of anxiety, stress, and fear.⁸⁹

The issues concerning gender nonconforming children and their access to school bathrooms present problems distinct from those faced by gender nonconforming adults. First, because they are not sexually mature, concerns regarding sexual abuse and harassment diminish. Second, it is easier for gender nonconforming children to “pass” as their identified gender because they have not gone through puberty; thus, their peers may never discover that they are anatomically different. Third, this ability to “pass” may also diminish some of the privacy concerns that exist for adults who are less able to hide their anatomical differences.

On the other hand, regardless of whether their children are diagnosed

Frontier of Equal Protection, 9 U. PA. J. CONST. L. 895 (2007) (explaining how bathroom access is a fundamental indicator of equality for transgender individuals and proposing local level reform to improve transgender individuals’ access to bathrooms that match their gender identity).

⁸⁴ Levy, *supra* note 81, at 276–78.

⁸⁵ *Id.* at 277.

⁸⁶ *Id.* at 256, 258–61.

⁸⁷ *Id.* at 255–58, 267–69.

⁸⁸ *Id.* at 268.

⁸⁹ *Id.*

with GD, all parents have an interest in the safety of their children. Since developing children have heightened sensitivity to confusion and discomfort, which may result from using bathrooms with their opposite-sex peers with GD, forgoing the practice of maintaining segregated bathrooms may invite bullying and harassment among students and jeopardize their safety. Nevertheless, providing gender nonconforming children access to the bathroom that matches their gender identity is important given that it is one of the only means of gender expression available to children who are not old enough to receive medical treatment.

III. LAWS OF THE BATHROOM

Today's "norm" of maintaining gender-segregated bathrooms raises distinct issues for gender nonconforming people.⁹⁰ Despite protection against sex discrimination in schools,⁹¹ the Code of Federal Regulations provides that schools receiving federal funding "may provide separate toilet, locker room, and shower facilities on the basis of sex, [as long as] such facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex."⁹² Additionally, many states that prohibit sex discrimination in public accommodations specifically exempt sex-segregated bathrooms in other state codes.⁹³

Many people implicitly conclude that bathrooms segregated by *sex* are segregated on the basis of *natal sex*, and they react strongly against those who do not share their conventional view.⁹⁴ Some adults express feelings of violation and fear when they encounter a gender nonconforming individual in a restroom.⁹⁵ Such reactions can cause anxiety for a gender nonconforming individual whenever he or she uses a

⁹⁰ See JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 73–79 (2012).

⁹¹ See Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

⁹² 34 C.F.R. § 106.33 (2000).

⁹³ See, e.g., Case, *supra* note 81, 211 (citing TEX. ALCO. BEV. CODE ANN. § 61.43(a)(8)(B) (West 2003) to demonstrate the "innumerable" local and state sex segregated bathroom laws); Doe v. Clenchy Order, *supra* note 19, at 11 (explaining how the Maine Human Rights Commission allows educational facilities to provide separate toilets on the basis of sex).

⁹⁴ See GREENBERG, *supra* note 90, at 74 (describing one woman's reaction to a male-to-female transgender person using the women's bathroom as "sexual violence" against her).

⁹⁵ *Id.*

public restroom.⁹⁶ In extreme cases, a gender nonconforming individual may be confronted by a police officer or security guard who demands to know who the person is and what their sex is.⁹⁷

With public awareness of gender nonconformity increasing, educational institutions and companies are adopting policies that benefit not only gender nonconforming individuals but also disabled individuals with opposite-sex helpers and parents with young children.⁹⁸ 623 colleges and universities in forty-five states prohibit discrimination on the basis of gender identity and expression.⁹⁹ Some universities have gone a step further and voluntarily constructed gender-neutral bathrooms to make their campuses more transgender friendly, and currently, more than 150 campuses have gender-neutral bathrooms.¹⁰⁰ When the College of Staten Island built a gender-neutral bathroom in each building in 2010, Professor Dr. Syed Rizvi described the change as “common sense,” explaining that “[i]t provides people with a safe environment to perform basic human functions.”¹⁰¹ The University of Vermont also offers gender-neutral restrooms to accommodate both transgender students and parents of small children,¹⁰² and the University of Oregon now offers gender-neutral locker rooms.¹⁰³ Further, ninety-seven colleges and universities offer gender-inclusive housing, allowing students to have a roommate of any gender.¹⁰⁴

These positive changes are also occurring outside the ivory tower. In 2010, all Starbucks in the Washington D.C. area changed their sex-segregated bathrooms to be gender-neutral.¹⁰⁵ Despite the D.C. Human

⁹⁶ *Id.*

⁹⁷ Jaya Saxena, *College of Staten Island Builds Unisex Bathrooms*, GOTHAMIST (April 20, 2010, 10:00 AM), http://gothamist.com/2010/04/20/college_of_staten_island_builds_uni.php.

⁹⁸ *Id.*

⁹⁹ *Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression*, TRANSGENDER L. & POL’Y INST. (Aug. 21, 2013), <http://www.transgenderlaw.org/college/index.htm#policies>. Alabama, Alaska, Arkansas, West Virginia, and Wyoming do not have a transgender-inclusive nondiscrimination policy. *Id.*

¹⁰⁰ Brett-Genny Janiczek Beemyn, *Ways That U.S. Colleges and Universities Meet the Day-to-Day Needs of Transgender Students*, TRANSGENDER L. & POL’Y INST., <http://www.transgenderlaw.org/college/guidelines.htm> (lasted visited Oct. 22, 2013).

¹⁰¹ Saxena, *supra* note 97.

¹⁰² *Id.*

¹⁰³ Mike O’ Brien, *Closing One Door Now Opens Many Others*, OREGON DAILY EMERALD (Sept. 27, 2007, 12:00 AM), <http://dailymerald.com/2007/09/27/closing-one-door-now-opens-many-others/>.

¹⁰⁴ *Colleges and Universities that Provide Gender-Inclusive Housing*, TRANSGENDER L. & POL’Y INST. (Aug. 21, 2013), <http://www.transgenderlaw.org/college/index.htm#housing>.

¹⁰⁵ Anna North, *DC Starbucks Will Switch to Gender-Neutral Restrooms*, JEZEBEL (Oct. 1,

Rights Act, which provides that businesses must allow individuals to use the restroom of their identified gender¹⁰⁶ and that single-occupancy restrooms must be gender-neutral,¹⁰⁷ many businesses in D.C. maintain sex-segregated bathrooms.¹⁰⁸

IV. GAINING ACCESS

Part IV comprises the Note's main argument. Part IV.A provides an overview of the current legal landscape of sex-segregated bathrooms in schools and evaluates the more common avenues that a gender nonconforming child may pursue to gain access to the school bathroom that matches his or her gender identity. Part IV.B proposes that use of a state disability law claim is the best legal cause of action for allowing a gender nonconforming child to use the bathroom that matches his or her gender identity. Part IV.B discusses the strengths and drawbacks of the state disability law claim, and ultimately concludes that it is the best possible option at this time.

A. THE CURRENT LEGAL LANDSCAPE OF SEX-SEGREGATED BATHROOMS IN SCHOOLS

State and federal laws prohibiting discrimination in public accommodations govern the use of restrooms in schools, restaurants, hotels, and other public establishments.¹⁰⁹ Title IX, however, offers no relief to gender nonconforming students because schools receiving federal funding are expressly allowed to maintain sex-segregated, separate-but-equal bathrooms.¹¹⁰ Furthermore, "innumerable" state and local

2010, 4:26 PM), <http://jezebel.com/5653179/dc-starbucks-will-switch-to-gender+neutral-restrooms>.

¹⁰⁶ D.C. MUN. REGS. tit. 4, § 801 (2006) (defining discrimination to include "denying access to restrooms and other gender specific facilities that are consistent with a customer's or client's gender identity or expression").

¹⁰⁷ *Id.* tit. 25-A, § 3101 (2012) ("All single-occupancy toilet rooms shall display gender-neutral signs on the door that read "restroom," or have a universally recognized pictorial indicating that persons of any gender may use each restroom.").

¹⁰⁸ North, *supra* note 105.

¹⁰⁹ See *State by State Guide to Laws That Prohibit Discrimination Against Transgender People*, NAT'L CENTER FOR LESBIAN RTS. (2010), <http://www.nclrights.org/wp-content/uploads/2013/07/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf> [hereinafter NCLR State Guide].

¹¹⁰ 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."); 34 C.F.R. § 106.33

ordinances have been enacted to carve out exceptions to permit sex-segregated bathrooms.¹¹¹ Additionally, various other legal hurdles present challenges for gender nonconforming children seeking access to the school bathroom that matches their gender identity.

1. Fourteenth Amendment Equal Protection Clause Claim

The Fourteenth Amendment's equal protection guarantee extends to discrimination on the basis of sex; however, the Supreme Court has declined to treat sex as an inherently suspect class.¹¹² Rather, classifications based on sex are subject to "intermediate scrutiny," under which the state must prove that different treatment of the sexes serves an important government purpose and that the law is substantially related to achieving that purpose.¹¹³ Thus, federal and state laws that permit sex-segregated bathrooms are only subject to intermediate scrutiny, which offers a wide range of arguments for the government defending a lawsuit.

If an anatomically female child with male gender identity files a complaint against his school district claiming that his school's sex-segregated bathrooms unconstitutionally discriminate against him as a gender nonconforming female, a variety of defenses are available to the school district. First, the school district may argue that it has an important interest in preparing children for society and that sex-segregated bathrooms serve this purpose because most restrooms in today's society are sex-segregated.¹¹⁴ Second, the school district may claim that sex-segregated bathrooms provide a safer and cleaner environment for both genders, which serves a public health objective.¹¹⁵

Third, using the public safety argument, the school district may claim that gender-neutral bathrooms not only expose girls to potential sexual

(2000) (allowing exceptions for comparable sex-segregated restrooms).

¹¹¹ See Case, *supra* note 81, at 211.

¹¹² *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (holding that a state law which mandated preference for males in the administration of estates was unconstitutional discrimination); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (concluding that a state law unconstitutionally discriminated on the basis of sex with different age requirements for males and female for the purchase of alcohol).

¹¹³ See *Reed*, 404 U.S. at 75–76; *Craig*, 429 U.S. at 204.

¹¹⁴ See Case, *supra* note 81, at 211.

¹¹⁵ *But see* Levy, *supra* note 81, at 267 (explaining that having unisex bathrooms would allow teachers to supervise students in the schools' public restrooms regardless of gender).

violence but also invite bullying and peer harassment in general.¹¹⁶ Fourth, the school district may argue that sex-segregated bathrooms serve the important objective of preventing invasions of privacy between the sexes.¹¹⁷ Any one of these defenses is likely to overcome the hurdles of intermediate scrutiny.

The school district's possible justifications for sex-segregated bathrooms reinforce negative gender stereotypes.¹¹⁸ By implying that women need protection from men, the safety justification reinforces the outdated notions that women are weak and vulnerable, and that men are violent and predatory.¹¹⁹ The privacy justification also negatively reinforces the stereotype that women are vain and need a private space to check their appearances.¹²⁰ Although assault and harassment can occur anywhere, the safety justification treats "unsubstantiated risks of sexual harassment and assault against women as though they [are] facts," and ignores numerous studies showing that gender nonconforming individuals are the ones who have reason to fear physical harm.¹²¹ Further, the privacy interest becomes less of a concern if all urinals and toilets are behind locked stalls, which may even increase privacy in public restrooms.¹²²

If a gender nonconforming child can successfully argue that he or she is a member of an inherently suspect class, the Fourteenth Amendment will provide the equal protection right. In order to be treated as a member of a suspect class, however, the child will need to show that he or she is a member of a discrete minority with little political power and a history of discrimination based on an immutable characteristic,¹²³ namely nonconforming gender identity.¹²⁴

¹¹⁶ *But see id.* at 256 (describing men's restrooms as more dangerous than women's restrooms because men's restrooms are often used for drug deals, illegal sexual activity, and other criminal activity).

¹¹⁷ *See id.* at 276–78.

¹¹⁸ *See id.* at 255–58 (arguing that "[s]ex-segregated restrooms disparately impact women because . . . [they] perpetuate gender stereotypes that unfairly burden the abilities, roles, and images of women, which preserve the lower status of women").

¹¹⁹ *Id.* at 255–57.

¹²⁰ *Id.* at 258.

¹²¹ Marco Chan, *Safe Bathrooms for All*, THE HARVARD CRIMSON (February 17, 2011), <http://www.thecrimson.com/article/2011/2/17/bathroom-genderneutral-gender-many/>.

¹²² Levy, *supra* note 81, at 260 (urging that having each toilet separately enclosed from floor to ceiling would curtail the ability for pecking and touching).

¹²³ *See Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973) (holding that a military policy awarding different benefits on the basis of sex was unconstitutional discrimination).

¹²⁴ Elkind, *supra* note 83, at 902–05.

Although some evidence suggests that transgender adults may be able to prove the “immutability” of their gender identity,¹²⁵ a child is unlikely to meet this burden given that no evidence suggests that GD is permanent. In fact, most studies indicate that the majority of gender nonconforming children diagnosed with GD do not meet the criteria for GD in adulthood.¹²⁶ Furthermore, it has been almost fifty years since the Court recognized a new class.¹²⁷ Thus, the Court’s unwillingness to expand the suspect classification and the static nature of equal protection jurisprudence suggest that gender identity is unlikely to be recognized as a new class anytime soon.

2. First Amendment Freedom of Speech Claim

Some gender nonconforming students have successfully demonstrated that a school dress code policy that prohibits cross-gender dressing violates their freedom of speech under the First Amendment. In *Doe v. Yunits*, a school was enjoined from prohibiting an anatomically male student with female gender identity from wearing girls’ clothes.¹²⁸ Her therapist testified “that it was medically and clinically necessary for [her] to wear clothing consistent with the female gender and that failure to do so could cause harm to [her] mental health.”¹²⁹ The court found that the student’s dress was a form of speech protected by the First Amendment, as it was a symbolic act meant to convey a particular message—her gender identity—to other students who were likely to understand the conveyed message.¹³⁰

Bathroom usage and clothing choice are similarly connected to the expression of gender identity. Just as the student in *Doe v. Yunits* expressed her gender identity through her clothing,¹³¹ a gender nonconforming child can express his or her gender identity through the choice of bathroom. Unlike with clothing, however, a First Amendment

¹²⁵ *Id.* at 905.

¹²⁶ DSM-V, *supra* note 38, at 455.

¹²⁷ Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 503 (2004) (arguing that the Court’s decision in 1976 in *Craig v. Boren*, 429 U.S. 190, 210 (1976) was the last time the Court altered the equal protection doctrine in applying intermediate scrutiny to a sex-based classification).

¹²⁸ *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct., 11, 2000).

¹²⁹ *Id.*

¹³⁰ *Id.* at *3–4.

¹³¹ *Id.*

argument would probably fail in a bathroom segregation case because the government is permitted to restrict expression if the restriction is not related to the suppression of speech and is necessary to further an important or substantial government interest.¹³² Although a person's bathroom choice is a symbolic act that conveys a message about the person's gender identity, maintaining sex-segregated bathrooms is probably permissible because it relates to issues other than suppressing the expression of gender identity, and arguably promotes safety and privacy, which are generally considered legitimate government interests.¹³³

3. Federal Discrimination and Disability Law Claims

Alternatively, children with GD may challenge bathroom segregation by utilizing arguments that draw on Title VII sex stereotyping claims. In *Price Waterhouse v. Hopkins*, the Supreme Court held that Title VII bars sex discrimination not only based on natal sex, but also based on sex stereotyping.¹³⁴ Moreover, in 2012, the Equal Employment Opportunity Commission (EEOC) made its position clear that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."¹³⁵ Thus, children bringing a sex stereotyping claim under this framework may argue that prohibiting them from using the bathroom of their gender identity forces them to conform to stereotypical gender norms.¹³⁶ This argument is unlikely to prevail, however, because courts, like in Nicole's case, are unlikely to apply Title VII analysis to discrimination in educational institutions, which is governed by Title IX.

As of 2010, ten states and the District of Columbia have statutes prohibiting harassment based on gender identity in public schools and

¹³² See *id.* at *3.

¹³³ See *id.* at *4.

¹³⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (defining sex stereotyping as discrimination based on an employee's failure to conform to stereotypical expectations defined by gender).

¹³⁵ *Macy v. Holder*, EEOC Appeal No. 0120120821, at *4 (Apr. 20, 2012).

¹³⁶ Courts have applied *Price Waterhouse v. Hopkins* to cases involving transgender plaintiffs and held that discrimination against an employee based on his failure to conform to the gender stereotypes of his sex constitutes actionable discrimination. NCLR State Guide, *supra* note 109, at 1–2. The First, Sixth and Ninth Circuits have also applied Title VII protections to transgender plaintiffs. *Id.*

some private schools that receive state funding.¹³⁷ Although these statutes protect gender nonconforming students from discrimination, they do not expressly permit students to use the bathroom of their identified gender. Even states that explicitly protect gender identity under their discrimination laws may not recognize the right to use a bathroom according to gender identity. In *Goins v. West Group*, a transgender woman sued her employer under Minnesota's anti-discrimination law, which included gender identity and gender expression, after being prohibited from using the women's bathroom at work.¹³⁸ The Minnesota Supreme Court granted summary judgment in favor of the employer reasoning that the "traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender."¹³⁹

Last, the Americans with Disability Act (ADA) prohibits discrimination against disabled persons.¹⁴⁰ The ADA, however, expressly excludes GD from its definition of disability.¹⁴¹ Therefore, unless the ADA is amended to include GD, gender nonconforming children will be unable to seek protection under the ADA. Because federal sex discrimination, equal protection, and First Amendment claims are all likely to fail, and the federal disability laws do not apply to GD, the best legal means for gender nonconforming students seeking access to the bathroom that matches their gender identity is to bring a claim under their state's disability law.

B. GETTING A FOOT IN THE DOOR: A STATE DISABILITY CLAIM

Most states have statutes that prohibit discrimination against disabled individuals in public accommodations.¹⁴² Once a plaintiff establishes that he or she has a disability, the plaintiff may also have to prove: that "the disability was directly related to the employee's performance of the job, [that] the defendant knew of and did not attempt to reasonably accommodate the handicap, or [that] the defendant did not experience

¹³⁷ California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, Oregon, Vermont, Washington, and the District of Columbia all have such laws or regulations. NCLR State Guide, *supra* note 109, at 4.

¹³⁸ *Goins v. West Group*, 635 N.W.2d 717, 721 (Minn. 2001).

¹³⁹ *Id.* at 723.

¹⁴⁰ 42 U.S.C. § 12101(a) (2008).

¹⁴¹ *Id.* § 12211(b)(1).

¹⁴² Chung, *supra* note 80, at 15.

undue hardship in attempting a reasonable accommodation of the handicap.”¹⁴³

States define disability differently under their anti-discrimination statutes.¹⁴⁴ Some states take a three-prong approach similar to the federal law, and require a plaintiff to show that he or she “(1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such impairment, or (3) is regarded as having such an impairment.”¹⁴⁵ Some states, however, only require that an impairment be “demonstrable by medically accepted clinical or laboratory diagnostic techniques.”¹⁴⁶

A child in a state that utilizes the three-prong approach must have been diagnosed with GD and demonstrate that prohibiting expression of gender identity by requiring the use of a specific sex-segregated bathroom substantially limits a major life activity, namely using the bathroom. In some states, however, the only proof required is that a child has “medically cognizable or diagnosable” GD.¹⁴⁷ For example, in 2003, the Supreme Court of New York recognized a minor’s diagnosis of GD as a disability under New York’s Human Rights Law.¹⁴⁸ John Doe, a seventeen-year-old girl diagnosed with GD living in an all-male foster care center sued the New York City Administration for Children’s Services after she was prohibited from wearing female clothing.¹⁴⁹ Doe was allowed to wear traditionally feminine accessories such as scarves, make-up, and hair extensions, but Doe’s doctor testified that her “treatment plan” included fully dressing as a female in order to “facilitate acceptance of the gender identity.”¹⁵⁰ Under New York law, the foster care facility was required to “make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling.”¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 15–16.

¹⁴⁶ State Div. of Human Rights on Complaint of McDermott v. Xerox Corp., 65 N.Y.2d 213, 215 (1985).

¹⁴⁷ Chung, *supra* note 80, at 16.

¹⁴⁸ *In re Doe v. Bell*, 754 N.Y.S.2d 846, 851 (2003) (Doe also sought relief claiming that the dress code policy violated her freedom of expression but the court did not reach that argument because it granted her relief on her disability discrimination claim).

¹⁴⁹ *Id.* at 848.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 850.

The applicable statute defined “disability” broadly as “a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.”¹⁵² Thus, Doe’s GD diagnosis enabled her to satisfy New York’s definition of disability under its Human Rights Law.

Accordingly, the court found that although the prohibition against female clothing was discriminatory neither on its face nor as applied to all minors in the facility, Doe was entitled to an exemption from the prohibition as a reasonable accommodation for her disability.¹⁵³ The court held that “exempting Doe from [the facility’s] dress policy [was] a reasonable accommodation” because her treatment for GD required that she “be able to wear feminine clothing, including dresses and skirts.”¹⁵⁴

Though such accommodations are only appropriate when they do not negatively impact the well-being of others without the disability, the court notably commented that “courts must be wary of adverse treatment visited on persons with disabilities based on a need to protect others from them, lest overbroad generalizations about a disability be used as a justification for discrimination.”¹⁵⁵ In fact, the Eighth Circuit seemed to recognize this very principle when it held that allowing a male transgender employee to use the women’s restroom did not create a hostile work environment, as claimed by one of her coworkers.¹⁵⁶

Transgender adult prisoners have also succeeded by framing GD as a medical disability requiring treatment. In 2009, Vanessa Adams, a transgender female prisoner brought a lawsuit against the Federal Bureau of Prisons (BOP), claiming that denying her medical treatment for GD constituted cruel and unusual punishment.¹⁵⁷ At the time, the BOP had a national policy of withholding treatment from prisoners with GD who had not received treatment for it before being incarcerated.¹⁵⁸ As part of the settlement, however, the BOP agreed to discontinue this policy and now

¹⁵² *Id.*

¹⁵³ *Id.* at 853.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 854–55.

¹⁵⁶ *Cruzan v. Special Sch. Dist.*, No. 1, 294 F.3d 981, 981 (8th Cir. 2002).

¹⁵⁷ *Case Summary & History*: Adams v. Federal Bureau of Prisons et al., NAT’L CENTER FOR LESBIAN RTS., <http://www.nclrights.org/cases-and-policy/cases-and-advocacy/adams-v-federal-bureau-of-prisons-et-al/> (last visited Oct. 27, 2013).

¹⁵⁸ *Id.*

provides that:

[I]ndividuals in the custody of the BOP with a possible diagnosis of [GD] will receive an individualized assessment and evaluation and that treatment plans will be developed based on current accepted standards or care for [GD] and will not depend on the individual having received [GD] treatment prior to incarceration.¹⁵⁹

Though a prisoner's right to medical treatment may seem very different than a child's right to use the bathroom of his or her identified gender, the *Adams* case provides useful insight. When GD is framed as a medical condition that requires treatment, as in *Doe v. Yunits* and *Adams v. Federal Bureau of Prisons*, individuals diagnosed with GD can bring a cognizable claim if the governing law so allows.

Children bringing a disability claim may argue that access to the bathroom that matches their gender identity is a necessary part of their treatment because it is one of the limited ways in which they are able to express their gender identity until they are old enough to receive medical treatment. If GD is considered a disability under the applicable state law and the treatment requires gender expression, then a school's prohibition of bathroom use according to gender identity prevents treatment and constitutes discrimination on the basis of the student's disability. A GD diagnosis is therefore crucial to bringing a state disability claim. As in *Doe v. Bell*, the treating physician could testify that gender expression, including bathroom use, is a necessary part of treatment.

States that require a reasonable accommodation for persons with disabilities will require that schools make reasonable accommodations to ensure that students with disabilities enjoy equal treatment. In *U.S. Airways, Inc. v. Barnett*, the Supreme Court held that plaintiffs bringing a disability action against their employers "need only show that an 'accommodation' seems reasonable on its face."¹⁶⁰ After this initial showing, the defendant bears the burden of demonstrating that undue hardship would result in the particular circumstances if the accommodation were to be made.¹⁶¹

If a court finds that a student's GD is a disability and that restricting bathroom use is disability discrimination, the school may be required to

¹⁵⁹ *Id.*

¹⁶⁰ *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001) (holding that an employer did not fail to reasonably accommodate an injured worker's disability when the worker requested a transfer to a different position that was only available to employees on a seniority basis).

¹⁶¹ *Id.* at 402.

accommodate the student in one of two ways. Ideally, the school would allow the student to use the bathroom that conforms to his or her gender identity. Alternatively, a school may make single-use, gender-neutral bathrooms available to all students. The second option would eliminate the stigma that gender nonconforming children face when they are forced to use a staff bathroom or the conflicting sex-segregated bathrooms, but it is less desirable than allowing the children to use the sex-segregated bathroom that matches their gender identity.

On the other hand, a school may demonstrate undue hardship in a number of ways. Concerns about feasibility play a role in deciding the reasonableness of potential accommodations.¹⁶² Designating gender-neutral, single-use bathrooms and making them available to all students is likely to burden the school with significant costs that may not be economically feasible. However, allowing students to use the sex-segregated bathroom that conforms to their gender identity does not impose extra costs on the school because the facilities already exist, and gender nonconforming children do not need any special or unique accommodations in the already existing bathroom facilities.

A school may also cite safety concerns to demonstrate an undue hardship. Specifically, the school may claim that allowing students with GD to use the bathroom that matches their gender identity invites bullying and harassment. If allowing students with GD to use the bathroom that matches their gender identity raises safety concerns, however, then the school should address safety on a wider scale to ensure that all students are safe not only in the bathrooms, but also anywhere on the school grounds.

The school may also claim that adverse reactions from parents create an undue hardship.¹⁶³ In fact, the claims of other parents are often used as a counter argument against allowing gender nonconforming children to express their gender identity.¹⁶⁴ Parents often claim that allowing gender nonconforming children to use the bathroom of their gender identity will harm the other children. Gender nonconforming children are not dangerous, however, nor are they predators.¹⁶⁵ Rather, gender

¹⁶² *Id.* at 401–02.

¹⁶³ English, *supra* note 5.

¹⁶⁴ *Id.*

¹⁶⁵ Autumn Sandeen, *The Predator Argument Doesn't Work With Transgender Fifth Graders*, PAM'S HOUSE BLEND (June 10, 2008, 6:00 PM), <http://pamshouseblend.firedoglake.com/2008/06/10/the-predator-argument-doesnt-work-with-transgender-fifth-graders/>.

nonconforming children are expressing their true identity through one of the only means available to them before they can undergo medical treatment. Allowing such expression simply does not harm other students. As the court in *Doe v. Yunits* noted, “exposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone’s unique personal experience in that ‘Brave New World’ out there.”¹⁶⁶

A school may also argue that allowing bathroom use according to gender identity would create an undue burden because it would be disruptive and distracting to students. On the contrary, a child who looks and acts like a girl using the boys’ bathroom or a staff bathroom is much more disruptive than allowing her to simply use the girls’ bathroom. Children are unlikely to even question her use of the girls’ bathroom, but segregating her and treating her differently than other students will only draw attention to her nonconforming gender identity, which may invite bullying and harassment.

Finally, the school may claim that sex-segregated bathrooms are necessary for students’ privacy. Allowing a child with female gender identity to use the girls’ bathroom does not invade the privacy of other girls. Rather, it simply means that the child with female gender identity, like any other girl, will share the restroom with other members of her gender, who share the same privacy concerns—namely, the privacy concerns of school girls.

Unfortunately, disability claims do not offer a perfect solution. First, it should be emphasized that this Note does not argue that gender nonconformity is a disability. Rather, this Note evaluates the potential of a state disability claim as the most successful legal argument available to gender nonconforming children in gaining access to the bathroom of their gender identity. Admittedly, a disability claim may be hazardous because it entails the risk of reinforcing the negative stereotypes held by people who do not understand gender nonconformity, or who view gender nonconforming children as having something “wrong” with them. Since gender nonconformity is widely misunderstood and stigmatized, using disability claims may aggravate the societal stigma and negative judgment. Furthermore, even if a state disability claim is a successful means of achieving the proposed goal, it has unique drawbacks.

One significant disadvantage to bringing a disability claim is that the success of the claim hinges on how broadly or narrowly a state interprets

¹⁶⁶ *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, *8 (Mass. Super. Ct. Oct. 10, 2000).

“disability” under the applicable law. States that expressly disclaim gender identity from disability statutes and states with the three-prong approach that do not view gender-matching bathroom use as a major life function will not offer a legal remedy to gender nonconforming children. For example, in *Doe v. Yunits*, although the court granted the student’s claim on First Amendment grounds, it expressly stated that her claim would likely fail under the disability discrimination analysis because there was “no authority to support the notion that [GD] is a protected disability under the [applicable Massachusetts law]” which tracked the federal treatment of GD under the ADA.¹⁶⁷ Therefore, states with broad definitions of “disability” will be most receptive to claims made by children with GD.

Another concern with the state disability claim is a child’s ability to obtain a diagnosis. Parents may be reluctant to acknowledge a child’s gender nonconformity, and may refuse to seek treatment or to allow the child to express his or her gender identity. Further, children with low socio-economic status and children living in rural or conservative areas may not have access to physicians who are familiar with GD, and can properly diagnose and treat GD.

Additionally, disability claims entail the risk of “medicalizing” gender nonconformity because they require a “medically cognizable or diagnosable” GD.¹⁶⁸ In order to support a disability claim, children must be labeled with GD, which is strongly associated with the stigma of mental illness, like any other diagnostic label. Once labeled, children may have to endure negative reactions from people who refuse to tolerate differences and to understand their unique personal experiences.

Finally, in order to bring any claim, children must have parents or guardians acting on their behalf. If a parent is unwilling to acknowledge a child’s gender nonconformity or to allow the child to express his or her gender identity, then the child will have no means of bringing a legal claim.

V. CONCLUSION

Despite the potential drawbacks of bringing a state disability claim, it remains the best option for children with GD seeking access to the bathroom that matches their gender identity. Fortunately it seems that a

¹⁶⁷ *Id.* at *7.

¹⁶⁸ Chung, *supra* note 80, at 38.

change may very well be on the horizon, as the awareness of gender identity is spreading. As of 2012, sixteen states and the District of Columbia, as well as 143 cities and counties, have laws prohibiting discrimination based on gender identity or gender expression.¹⁶⁹ In December 2012, the Orange County School Board in Florida extended its nondiscrimination policy to include gay, lesbian, and transgender students and staff.¹⁷⁰

In the meantime, however, young children like Nicole, D, and Isaac are still in need of means to express their gender identity amongst their peers. They need to be able to live without fear that they will be chased into bathrooms by bullies or banished to a staff bathroom. As long as GD is listed in the *Diagnostic and Statistical Manual of Mental Disorders*, gender nonconforming children should use it to their advantage, as a means to figuratively and literally open the (bathroom) door to equal treatment. Hopefully, once children successfully litigate their disability claims and are able to freely express their gender identity, their peers will respond with acceptance and tolerance.

Precisely because these children are so young, equal treatment in front of their peers provides an important and impactful lesson: teaching children that gender identity is never a reason to discriminate and that everyone has unique personal experiences that may differ from their own. The high rate of depression and feelings of isolation may decrease if children can go to school and express who they are without fear of ridicule. Until then, a state disability claim presents a viable option for these children to gain equal rights. Hopefully, once the bathroom door is even slightly opened, it will teach children and adults that though what is on the outside may define your sex, what is on the inside defines your gender.

¹⁶⁹ *Non-Discrimination Laws That Include Gender Identity and Expression*, TRANSGENDER L. & POL'Y INST., <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last visited Oct. 27, 2013).

¹⁷⁰ Lauren Roth, *Gay Rights Supporters Relieved by Orange School Board Anti-Bias Vote*, ORLANDO SENTINEL (Dec. 12, 2012), <http://www.orlandosentinel.com/features/education/os-orange-schools-adopt-equality-protections-20121212,0,1129951.story>.